declared that if either one kept the whole mass an equitable distribution might be decreed, the judge having discretion to award a greater amount to one because of the better quality of his contribution to the mass. Of course, the only alternative would be to sell the product and equitably distribute the proceeds.

On the consummation of the confusion the right to possession of the whole mass immediately vests in the passive party.[16] Pending disposition of the title,[17] he may, therefore, maintain replevin for the entire lot.[18] Nor will trespass lie against him for taking it,[19] though it is then his duty to give the confuser an opportunity to identify his own or determine his share.[20] The burden is, however, on the latter to identify his own property or lose it.[21] Of course, where the plaintiff sues in trover all difficulties disappear and he recovers the value of his property at the time and place of conversion.[22] Thus in the recent case of *Samuel et al.* v. *Holbrook, Cabot & Rollins Corp.* (App. Div. 1913) 141 N. Y. Supp. 275, a majority of the court held the defendant guilty of conversion on its refusal to return iron of the plaintiff, which had, by mistake, been mixed with its own, although the defendant asserted identification to be impossible. The defendant having acted in good faith, the parties might well be tenants in common of the mass, and it is not in derogation of this fact to declare that, the goods being apportionable, the plaintiff might, on demand and refusal, recover the value of his aliquot share in conversion.[23]

RIGHT TO REGULATE THE RESALE PRICE OF PATENTED ARTICLES.—Previously existing ideas as to the right of the patentee to control the manner in which the vendee or subsequent owner of the patented article may deal with it, by imposing license restrictions at the time of the original sale, have been recently complicated by the decision in *Bauer & Cie* v. *O'Donnell* (1913) 33 Sup. Ct. Rep. 616. The Supreme Court determined that a patentee who has received all the cash consideration, which he contemplated, from the sale of the patented article has no right to regulate the price at which it may be sold thereafter. According to the almost unbroken line of authority prior to this decision the powers of the patentee seem to follow

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[16]The Idaho, *supra;* Stephenson *v.* Little, *supra;* Bryant *v.* Ware (1849) 30 Me. 295; but see Ryder *v.* Hathaway, *supra.*

[17]The civil law made no provision for the right of possession pending the distribution of the shares. Blackstone was evidently led astray in his description of the civil law in this respect, and it is curious to note that the view of the civil law taken by Kent in his commentaries, 2 Kent, Comm.* 364, and followed by Ryder *v.* Hathaway, *supra,* is as clearly erroneous.

[18]See Wingate *v.* Smith (1841) 20 Me. 287.

[19]Bryant *v.* Ware, *supra.*

[20]See The Idaho, *supra;* Bryant *v.* Ware, *supra.*

[21]First Nat. Bk. *v.* Schween (1889) 127 Ill. 573; Holloway Seed Co. *v.* Nat. Bk., *supra.*

[22]Wright *v.* Skinner, *supra;* Burnham *v.* Marshall (1883) 56 Vt. 365; see Hall *v.* Hargadine (1900) 23 Tex. Civ. App. 149.

[23]Stall *v.* Wilbur (1879) 77 N. Y. 158; Ripley *v.* Davis (1866) 15 Mich. 75.

simply and logically from the statutory grant of monopoly.[1] He receives from Congress no positive rights to practice the invention, for he already possesses them[2] by and subject to the law of the land.[3] The sole office of the patent statutes is to give to him, for a term of years, three distinct and co-ordinate rights of exclusion,[4] namely, the right to exclude all others from making, from using, and from selling his invention.

The patentee can only derive benefit from these rights of exclusion by selling immunity from suit to those who wish to invade his monopoly; but every right with regard to the invention which he does not expressly or impliedly license others to exercise, he reserves to himself and may protect by injunction.[5] A sale of the patented article technically transfers only the title to the materials,[6] but when it is unaccompanied by any restrictions, the patentee is regarded as having impliedly licensed its free use and sale,[7] and in these circumstances the article is said to have passed out of the monopoly.[8] But where actual restrictions accompany the sale of the article and are brought to the attention of the vendee and subsequent owners,[9] the restricted license is the full measure of the immunity from suit.[10] Thus the vendee of an article, licensed for use only once, infringes the patent if he uses it a second time, for he has violated the reserved right of the patentee.[11] And similarly, a retailer who buys a patented article, licensed for sale at a price of not less than one dollar, and who retails it for eighty-nine cents should be held to do so at his peril, for the patentee has used apt words to reserve to himself the exclusive right to retail the article for less than a dollar.[12] To this the court answers

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[1]R. S. § 4884; U. S. Comp. Stat. (1901) § 4884.

[2]Heaton-Peninsular Button Fastener Co. *v.* Eureka Specialty Co. (C. C. A. 1896) 77 Fed. 288; 25 Harv. L. Rev. 454.

[3]12 COLUMBIA LAW REVIEW 709 *et seq.*

[4]See Gaylor *v.* Wilder (1850) 10 How. 477, 494; Paulus *v.* Buck Mfg. Co. (C. C. A. 1904) 129 Fed. 594.

[5]Henry *v.* Dick (1912) 224 U. S. 1; Rupp and Wittgenfeld *v.* Elliott (C. C. 1904) 131 Fed. 730; Crown Cork Co. *v.* Brooklyn Co. (C. C. 1909) 172 Fed. 225.

[6]Robinson, Patents §§ 808, 824.

[7]See Hobbie *v.* Jamieson (1892) 149 U. S. 355; Keeler *v.* Standard Bed Co. (1894) 157 U. S. 659; 2 Robinson, Patents §§ 793, 824, 826.

[8]Bloomer *v.* McQuewan (1852) 14 How. 539; see Mitchell *v.* Hawley (1872) 16 Wall. 544. It is the unrestricted sale, and not the passing of title, which takes the article out of the monopoly. That the user has title is immaterial. Natl. Phonograph Co. *v.* Schlegal et al. (C. C. A. 1904) 128 Fed. 733. See 25 Harv. L. Rev. 641.

[9]See Cortelyou *v.* Johnson (1907) 207 U. S. 196; Dorsey Rake Co. *v.* Bradley Co. (U. S. D. C. 1874) 1 Ban. & A. 330.

[10]Mitchell *v.* Hawley, *supra;* Heaton-Peninsula Button Fastener Co. *v.* Eureka Specialty Co. *supra;* Cortelyou *v.* Lowe (C. C. A. 1901) 111 Fed. 1005.

[11]Amer. Cotton Tie Co. *v.* Bullard (U. S. C. C. 1879) 17 Blatchf. 160; Amer. Cotton Tie Co. *v.* Simmons (1882) 106 U. S. 89.

[12]These were the facts of the principal case. That the patentee has the right to regulate the resale price of the patented article has been held in the following decisions of the lower federal courts: N. J. Patent Co. *v.* Schaefer (D. C. 1906) 144 Fed. 437; The Fair *v.* Dover Mfg. Co. (C. C. A. 1908) 166 Fed. 117; Automatic Pencil Sharpener Co. *v.*

that having parted with title to the patented article and received all the consideration which he expected from the sale, the patentee has realized all the benefits intended to be conferred by the patent laws, and is not entitled to interfere with the retailer's acts of ownership over the chattel. As a matter of fact, a patentee seldom receives his full consideration from the sale of the article alone; it is the market for the sale which is of the first importance to him, and in patented articles peculiarly the market can rarely be maintained without a fixed retail price assuring a steady profit to jobbers and dealers.[13] Hence the fixing of the retail price is a very important part of the consideration for the sale of a patented article, and the major premise of the court's argument seems to be without foundation in fact. But at best the patentee's statutory rights of exclusion are unrelated in theory to the question of consideration at the original sale.[14]

The true explanation of the denial of the patentee's right to restrict the resale price of the article, when he has no direct interest in the proceeds of subsequent sales, must be found in the policy of the law to avoid the reservation of attributes of ownership by the vendor of a chattel.[15] It is difficult to see how the exercise of the right of exclusion contravenes public policy because Congress has given the right to exclude altogether, and this necessarily includes the right to exclude in part.[16] The rule heretofore acknowledged, and the only one logically tenable, is that "every condition, not in its very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that

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Goldsmith Bros. (C. C. 1911) 190 Fed. 205; Victor Talking Machine Co. *v.* The Fair (C. C. A. 1903) 123 Fed. 424; Natl. Phonograph Co. *v.* Schlegel, *supra;* Edison *v.* Smith Merc. Co. (C. C. 1911) 188 Fed. 925; Edison Phono. Co. *v.* Kaufmann (C. C. 1901) 105 Fed. 960; Edison Phono. Co. *v.* Pike (C. C. 1902) 116 Fed. 863.

[13]The testimony before Congressional Committee on Patents in hearing on the Oldfield bill established this fact.

[14]There have been three decisions in the federal courts in accord with the principal case. All have been rendered within the current year and no two agree as to the basis for denying the patentee's right. Waltham Watch Co. *v.* Keene (D. C. 1913) 202 Fed. 225; Ingersoll & Bro. *v.* M'Coll (D. C. 1913) 204 Fed. 147; Free Sewing Machine Co. *v.* Bry-Block Merc. Co. (D. C. 1913) 204 Fed. 632. In Bobbs-Merrill *v.* Straus (1907) 210 U. S. 339, the right of a copyright holder to regulate the retail price of the copyrighted book was denied, the grant of the copyright statute being substantially identical with that of the patent laws. The cases are not altogether analogous, however, in view of the fact that a copyright holder's own right to multiply and vend the copyrighted article is based on the statute and not on general law. Globe Newspaper Co. *v.* Walker (1907) 210 U. S. 356. In England an almost identical statute has received the contrary construction. See Drone, Copyrights 365 *et seq.*

[15]See Dr. Miles Medical Co. *v.* Park & Sons Co. (1911) 220 U. S. 373; Park & Sons Co. *v.* Hartman (C. C. A. 1907) 153 Fed. 24. But these decisions apply only to unpatented articles and expressly distinguish the right of a patentee to restrain trade in the patented article and to regulate subsequent sales.

[16]Dorsey Rake Co. *v.* Bradley Co., *supra.*

the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."[17]

EQUITABLE RELIEF AGAINST NUISANCES.—While it has long been a recognized rule of equity that in case of continuing nuisances an injunction will be granted, as a matter of right, where there is irreparable injury or a multiplicity of suits, the courts universally make two exceptions to the rule, and will weigh and balance the individual injuries of each party before the relief is granted. In the first place, where the plaintiff seeks only a temporary restraint, unless there is a pressing necessity for immediate relief the injunction will be refused.[1] Again, it has been held that the petitioner must seek his remedy at law when he has purchased property within the scope of the nuisance for the purpose of compelling the defendant to buy his legal rights at an exorbitant price.[2] Assuming, however, that the injunction should be granted as a matter of right in all cases where the remedy at law is inadequate, the motive or intention of the parties should not defeat the logical operation of the rule.[3] But when the plaintiff acquired his property with a desire to speculate on the defendant's willingness or ability to pay for the continued existence of his nuisance, viewed from the standpoint of "the man in the street," the denial of an injunction would work substantial justice.

A more troublesome question is presented, however, where the evidence clearly proves the complainant's rights are being infringed by the defendant's wrongful act, but the damage caused is slight as compared with the expense and loss to the defendant if an injunction is granted. There is a decided diversity of opinion in such cases in determining whether the injunction should issue as a matter of right, or whether it is within the discretion of the court to deny equitable relief on the ground that the plaintiff is entitled to nothing except as a matter of grace. In the recent case of *Whalen* v. *Union Bag & Paper Co.* (1913) 101 N E. 805 the New York Court of Appeals refused to balance the conveniences between the plaintiff and the defendant, and granted an injunction prohibiting the defendant from inflicting a comparatively small damage on the plaintiff's riparian rights. This result is fully sustained by eminent authorities in this

[17]Bement *v.* Nat. Harrow Co. (1901) 186 U. S. 70, 91; Henry *v.* Dick, *supra;* Cortelyou *v.* Johnson (C. C. 1905) 138 Fed. 110, reversed, 207 U. S. 196, solely because of failure to give notice of license restrictions; United States *v.* Standard Sanitary Co. (C. C. 1911) 191 Fed. 172, 190, affirmed, 226 U. S. 20; Blount *v.* Yale-Towne Mfg. Co. (C. C. 1909) 166 Fed. 555. In the two cases last cited the conditions attempted to be imposed by the patentee involved an agreement to restrain trade in unpatented articles or a combination to restrain trade in competing patented articles, and being unlawful by virtue of the Sherman Act were properly held invalid.

[1]This follows from the inherent nature of a temporary injunction in as much as in its operation it is very analogous to a judgment and execution before trial. Mammoth Vein Coal Co.'s Appeal (1867) 54 Pa. 183; 1 Joyce, Injunctions § 109.

[2]Edwards *v.* Allouez Mining Co. (1878) 38 Mich. 46; McCleery *v.* Highland Boy Gold Min. Co. (C. C. 1904) 140 Fed. 951.

[3]Savannah Ry. *v.* Woodruff (1890) 86 Ga. 94.